Floyd v Moreno
2022 NY Slip Op 34290(U)
December 15, 2022
Supreme Court, Kings County
Docket Number: Index No. 513956/2019
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9

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PRECIOUS L. FLOYD,

Plaintiff, **DECISION / ORDER**

-against- **Index No. 513956/2019**
Motion Seq. No. 1

CARLOS E. MORENO and ROGER F. PEREZ,

Defendants.

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Recitation, as required by CPLR 2219 (a), of the papers considered in the review of defendants' motion for summary judgment.

Papers	**NYSCEF Doc.**
Notice of Motion, Affirmation and Exhibits Annexed.....	21-30
Affirmation in Opposition and Exhibits Annexed.....	45-57
Reply Affirmation.....	58

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is a personal injury action which arises from a motor vehicle accident which took place on the morning of April 29, 2018 on Eastern parkway near the intersection with Washington Avenue in Brooklyn, NY. Plaintiff was driving in the left lane, and defendant Perez was driving a livery taxi owned by defendant Moreno in the right lane. The two cars collided when one of them attempted to change lanes. According to the police report, plaintiff's vehicle was impacted on the passenger side door, and defendants' was impacted on the driver's door. Plaintiff was removed from the scene in an ambulance and was treated at Kings County Hospital. At the time of the accident, plaintiff was thirty-six years of age. In her Bill of Particulars, plaintiff claims that as a result of the accident, she sustained injuries to her cervical and lumber spine and to both of her shoulders. She had arthroscopic surgery to both of her shoulders and claims the surgeries were necessitated by the accident. One

was performed on July 19, 2018 and the other was performed on October 18, 2019.

Defendants contend that they are entitled to summary judgment dismissing the complaint, and argue that plaintiff did not sustain serious injuries as a result of the accident, as defined by Insurance Law § 5102 (d). Defendants support their motion with an attorney's affirmation, the pleadings, plaintiff's deposition transcript, and affirmed IME reports from an orthopedist and a radiologist.

Dr. Jeffrey Guttman, an orthopedist, examined plaintiff on September 30, 2021, on behalf of the defendants, which was more than three years after the accident. Plaintiff told him that she had arthroscopic surgery to her shoulders and injections in her spine for pain. She had physical therapy, chiropractic treatment, acupuncture therapy and massage therapy, but was no longer treating. Plaintiff told him that she still had pain in her lower back and both shoulders. Dr. Guttman lists the records he reviewed, which were solely the bill of particulars, the police report, the ambulance report and the emergency room records. Dr. Guttman tested the range of motion in plaintiff's cervical spine, lumbar spine, and both shoulders. He reports that plaintiff had normal ranges of motion in her lumbar and cervical spine, without tenderness or spasms. He similarly reports normal ranges of motion in both of her shoulders, with no tenderness or swelling. All related tests to her shoulders were negative.

Dr. Guttman concludes that plaintiff sustained sprains to her spine, which have resolved, and that she is "status post bilateral shoulder arthroscopies resolved." He opines that "today's examination indicates that the injured body parts alleged in the Bill of particulars have resolved. The claimant did not sustain any significant or permanent injury as a result of the motor vehicle accident. There are no objective clinical findings indicative of a present disability or functional impairment which prevents the examinee from engaging in ADLs, including work, school, and hobbies."

Dr. Jessica F. Berkowitz, a radiologist, reviewed the MRIs of plaintiff's lumbar spine for defendants, which were taken on June 1, 2018. She opines that there are no disc bulges or herniations seen, and there is some indication of hypertrophic facet joint changes, which are chronic and degenerative. She concludes that there is "no causal relationship between the claimant's alleged accident and the findings on the MRI examination." She did not review the MRI films for plaintiff's cervical spine MRI, or her left or right shoulder MRIs, all of which were also conducted in 2018, according to the records submitted by plaintiff.

Defendants contend that their "proof rules out the 90/180-day category of the statute. Putting aside that this category requires proof that there was a causally related, medically determined injury, which we do not believe plaintiffs can establish, the 90/180 category requires proof that plaintiffs were medically prevented from performing "substantially all" of his usual and customary activities for the requisite period [aff in support Doc 22 ¶28]." It is not clear what counsel means here. Plaintiff testified at her EBT, held June 15, 2021, that she missed three months of work after her first shoulder surgery, which was performed on July 19, 2018, three months after the accident [Doc 26 Page 35]. This testimony does not entitle defendants to summary judgment on the 90/180-day category of injury.

The court finds that defendants have not made a *prima facie* showing of their entitlement to summary judgment (*see Toure v Avis Rent A Car Sys*., 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]).

As the defendants have failed to meet their burden of proof as to all claimed injuries and all applicable categories of injury, the motion must be denied, and it is unnecessary to consider the papers submitted by plaintiff in opposition (see *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept

2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

In any event, had defendants made a prima facie case for dismissal, plaintiff's treating doctor's affirmations are sufficient to overcome the motion and raise an issue of fact as to whether plaintiff sustained a serious injury as a result of the subject accident (*see Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]).

Plaintiff's doctor, Aron Rovner, M.D. provides an affirmed report (Doc 55) indicating significant and quantified restrictions in plaintiff's ranges of motion in her cervical and lumbar spine and in both shoulders, from tests performed in 2022, four years after the accident. In Doc 53, he provides the test results from her initial exam on June 21, 2018, which is affirmed, and which also indicates significant and quantified restrictions in plaintiff's ranges of motion in her cervical and lumbar spine and in both shoulders. Dr. Rovner opines that plaintiff's injuries were caused by the subject accident. He states, "I believe that patient's symptoms and diagnoses above regarding left and right shoulder, lumbar spine and cervical spine are directly causally related to the accident within a reasonable degree of medical certainty." He performed the right shoulder surgery in 2018, and the operative report is at page 8 of Doc 53. Thus, had defendants made a prima facie case for summary judgment, Dr. Rovner's affirmations would have been found to raise a "battle of the experts," requiring a trial. Accordingly, the motions are denied.

This constitutes the decision and order of the court.

Dated: December 15, 2022

ENTER:

Hon. Debra Silber, J.S.C.